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No. 06-371

Supreme Court, U.S.
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In The
Supreme Court of the United States

COUNCIL OF INDEPENDENT TOBACCO MANUFACTURERS OF AMERICA,

Petitioner,

v.

THE STATE OF MINNESOTA AND DAN SALOMONE, IN HIS OFFICIAL CAPACITY AS THE COMMISSIONER OF THE MINNESOTA DEPARTMENT OF REVENUE,

Respondents.

On Petition For A Writ Of Certiorari To The Minnesota Supreme Court

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

The Minnesota Cigarette Fee Act imposes a 35-cent per-pack fee upon the sale in Minnesota of "nonsettlement cigarettes," which are cigarettes manufactured by a person other than a manufacturer that has entered into a settlement agreement with the State of Minnesota. Cigarette manufacturers who choose to enter into such agreements either make annual payments to the State, or pay a higher fee than required by the Act, namely, 48 cents per pack. In addition, settling manufacturers that pay higher fees agree to abide by certain advertising and lobbying restrictions. Petitioner Council of Independent Tobacco Manufacturers of America ("CITMA") filed suit in Minnesota state court alleging that because the Cigarette Fee Act imposed a tax on those manufacturers that did not seek a settlement agreement that includes those restrictions, it abridged free speech protections, violated equal protection and due process guarantees, and was a bill of attainder. The Minnesota Supreme Court upheld the lower court's ruling dismissing all of CITMA's claims. CITMA petitions this Court only with respect to its First Amendment claim. The question presented is whether a statute that imposes a lower per-pack fee where the cigarette manufacturer chooses to retain advertising and lobbying rights; and a higher per-pack fee where those rights are voluntarily waived, unconstitutionally denies a benefit to Petitioner based on the exercise of its First Amendment rights.

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Respondents State of Minnesota and Dan Salomone in his capacity as Commissioner of the Minnesota Department of Revenue respectfully request that the Court deny the Petition for Writ of Certiorari seeking review of the Minnesota Supreme Court's opinion and judgment in this case. The Minnesota Supreme Court's Opinion is published at 713 N.W.2d 300 (Minn. 2006), and is reproduced in CITMA's Appendix ("Pet. App.") at Pet. App. 1-32. The opinion of the Minnesota Court of Appeals is published at 685 N.W.2d 467 (Minn. Ct. App. 2004) and is reproduced at Pet. App. 33-47. The trial court's Summary Judgment Order, which is unpublished, is reproduced at Pet. App. 48-71.

STATEMENT OF THE CASE

The Minnesota Legislature enacted the Cigarette Fee Act, Minn. Stat. § 297F.24 (2004) ("the Act"), to address the radical market changes that followed the 1998 settlement of Minnesota's landmark lawsuit ("State Tobacco Lawsuit") against the country's four largest cigarette manufacturers, Philip Morris, Inc., R.J. Reynolds Tobacco Co., Brown & Williamson Tobacco Corp., and Lorillard Tobacco Co. ("the Major Manufacturers").[1] Thus, the State's settlement with the Major Manufacturers, the market changes that followed that settlement, and the solutions

[1] The State had settled its claims against cigarette manufacturer, Liggett Group, Inc., on March 20, 1997, with an agreement that imposed monetary and non-monetary terms, including restrictions on Liggett's advertising practices. Pet. App. at 3-5.

that Minnesota and other states used to address those market changes are the backdrop against which CITMA brought its First Amendment challenge to the Act.[2]

Minnesota settled its case against the Major Manufacturers in May 1998 ("the Minnesota Agreement"). Under the terms of the settlement, the Major Manufacturers were required, among other things: (a) to make six one-time settlement payments to the State; (b) to make additional annual payments to the State in perpetuity; and (c) to significantly restrict their lobbying and advertising activities. Pet. App. at 3-4. In exchange, the State released the Major Manufacturers from all past and future tobacco-related claims, including future legal claims for reimbursement for health care costs allegedly associated with the use of or exposure to tobacco products. Pet. App. at 36.

Minnesota's settlement was followed, approximately six months later, by a Master Settlement Agreement, entered into between the Attorneys General of 46 other states, settling similar state suits to recover health care costs associated with treating smoking-related illnesses ("MSA"). Similar to Minnesota's agreement with the major manufacturers, the MSA required the Major Manufacturers to: (a) make five one-time payments; (b) to make annual payments in perpetuity; and (c) to substantially restrict their advertising and lobbying activities. Pet. App.

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[2] This case was heard in the trial court and on appeal based on stipulated facts. Pet. App. at 6, 50. Factual statements and claims that CITMA makes in this Petition that are not based on those facts are therefore outside the record of this case. For example, CITMA's claim that the Act has "no effect on competitors' cigarettes which are exempt from the Tax," Pet. Br. at 5, is inconsistent with the stipulated fact that manufacturers who have entered into the agreements described in the Act pay a *higher* fee than that imposed by the Act. *See* Pet. App. at 37.

at 36. In exchange, the settling states released the Major Manufacturers from a wide range of legal claims, including monetary claims related to the public health-related costs of smoking. Pet. App. at 25-26.

At the time Minnesota entered into its agreements with Liggett and the Major Manufacturers, those manufacturers represented more than 98 percent of the state cigarette market. Pet. App. at 4. By 2003, however, the collective Minnesota market share of nonsettling manufacturers had increased from 2 percent to 12 percent. Pet. App. at 5. These manufacturers, which were not making annual payments to the State and, therefore, had not increased their prices, had been able to offer their cigarettes at prices substantially lower than the Major Manufacturers. Pet. App. at 4, 37, 50-51, 69.

The capture of significant market share by nonsettling manufacturers caused two problems for Minnesota. First, the lower price of non-settlement cigarettes increased the probable incidence of youth smoking, thereby undermining the State's effort to curb smoking in that population. Pet. App. at 4-5. Second, the nonsettling manufacturers' increased market share, with the resulting increased availability of lower-priced cigarettes that did not include the State's health care costs, allowed a significant percentage of smokers to once again shift to the State the health-related costs of their smoking. Pet. App. at 4, 37, 51.

The MSA States had anticipated some of these marketplace responses, and therefore included a model "Qualifying Statute" for each participating state to pass to address this problem. Pet. App. at 9-10. The Qualifying Statute was intended: (1) to encourage manufacturers to join the MSA as "subsequently participating manufacturers" ("SPMs"),

and thus to compensate the MSA states for the health care costs of their products; and (2) to remove the competitive disadvantage that settling manufacturers would face in competing against nonsettling manufacturers ("NPMs"). Pet. App. at 9, 36. The MSA also included strong incentives for member states to enact and enforce a Qualifying Statute, by potentially reducing the State's annual payments based on the increased market share of NPMs if such a statute was not enacted. Pet. App. at 12. Under the enacted Qualifying Statutes, the NPMs who did not participate in the MSA are required to make payments into an escrow fund based on the number of cigarettes the NPM sells in a state. Pet. App. at 10. The NPM retains ownership of the escrow fund and of the interest that accrues over the 25-year period the payments must remain in escrow. *Id.* If a state successfully sues an NPM for health care costs, the Qualifying Statute ensures that the state will have a fund from which to collect. *Id.*[3]

Minnesota chose to use the Cigarette Fee Act to achieve a goal similar to that of the MSA states, to prevent non-settling manufacturers such as CITMA's members

[3] By 2003, federal courts had sustained the MSA and its related provisions against numerous challenges, including claims based upon: (1) the Sherman and Clayton Acts; (2) the First Amendment; (3) the Equal Protection Clause of the Fourteenth Amendment; (4) the Due Process Clause of the Fourteenth Amendment; (5) the Commerce Clause; (6) the Compact Clause; (7) the Import/Export Clause; and (8) the constitutional prohibition against bills of attainder. *See, e.g., Star Scientific, Inc. v. Beales*, 278 F.3d 339 (4th Cir.), *cert. denied sub nom. Star Scientific, Inc. v. Kilgore*, 537 U.S. 818 (2002); *A.D. Bedell Wholesale Co. v. Philip Morris, Inc.*, 263 F.3d 239 (3d Cir. 2001), *cert. denied*, 534 U.S. 1081 (2002); *Mariana v. Fisher*, 226 F. Supp. 2d 575 (M.D. Pa. 2002), *aff'd*, 338 F.3d 189 (3d Cir. 2003), *and cert. denied sub nom. Mariana v. Pappert*, 540 U.S. 1179 (2004); *PTI, Inc. v. Philip Morris, Inc.*, 100 F. Supp. 2d 1179 (C.D. Cal. 2000).

from exploiting the competitive advantage they derived from the circumstances created by the State's settlements. Pet. App. at 5. On May 25, 2003, Governor Pawlenty signed legislation enacting Minn. Stat. § 297F.24. *See* Act of May 25, 2003, ch. 127, art. 14, § 9, 2003 Minn. Laws 946-47. The Act imposes a 35-cent per-pack fee upon the sale of "nonsettlement cigarettes." *See* Minn. Stat. § 297F.24, subd. 1(a). The statutory term "nonsettlement cigarette" means a cigarette manufactured by a person other than a manufacturer: (a) that "is making annual payments to the state of Minnesota under a settlement of" the State Tobacco Lawsuit; or (b) that "has voluntarily entered into an agreement with the state of Minnesota . . . agreeing to terms similar to those contained in [the Minnesota Agreement] including making annual payments to the state . . . equal to at least 75 percent of the payments that would apply if the manufacturer was one of the four original parties to the [Minnesota Agreement]." Minn. Stat. § 297F.24, subd. 2(1)-(2).

The Act has three stated purposes: (1) to "ensure that manufacturers of nonsettlement cigarettes pay fees to the state that are comparable to costs attributable to the use of the cigarettes;" (2) to "prevent manufacturers of nonsettlement cigarettes from undermining the state's policy of discouraging underage smoking by offering nonsettlement cigarettes at prices substantially below the cigarettes of other manufacturers;" and (3) to "fund such other purposes as the legislature determines appropriate." Minn. Stat. § 297F.24, subd. 1(b).

The Act requires the Commissioner of Revenue to administer the fee "in the same manner as the [cigarette] excise tax imposed under section 297F.05." Minn. Stat. § 297F.24, subd. 3. Accordingly, the fee is imposed upon

cigarette distributors rather than manufacturers, who pass along its cost to their customers, and so on down the distribution chain to the retail level. Pet. App. at 37. A cigarette manufacturer that has not previously done so may enter into an agreement with the State. Minn. Stat. § 297F.24, subd. 2(2). Since the Commissioner of Revenue is authorized to administer the Act, he made two important determinations concerning its proper implementation with respect to further agreements with the State. First, the Act's requirement that new agreements must include "terms similar to those contained" in the Minnesota Agreement means that new agreements must include: (a) similar advertising and lobbying restrictions; and (b) similar release provisions. Pet. App. at 37. Second, the requirement that new agreements must involve annual payments equal to at least 75 percent of the payments made by one of the four original manufacturers under the Minnesota Agreement mandated payments as of September 2003 of at least 48 cents per pack of cigarettes sold in Minnesota. Pet. App. at 37.

On June 26, 2003, CITMA filed its action in Ramsey County District Court and moved for a temporary restraining order to prohibit the Commissioner of Revenue from implementing the Act on its July 1, 2003 effective date. Pet. App. at 38. CITMA alleged that the Act abridged free speech, violated equal protection and due process guarantees, and was a bill of attainder. The trial court denied CITMA's request for injunctive relief. Pet. App. at 38.

Thereafter, CITMA and the State entered into a Stipulation of Facts and brought cross-motions for summary judgment. Pet. App. at 6. On November 19, 2003, the trial court upheld the Act in all respects and granted the State's motion for summary judgment. Pet. App. at 48-71.

On August 24, 2004, the Court of Appeals issued its decision affirming the district court. Pet. App. at 33-47. On March 16, 2006, the Minnesota Supreme Court issued an Order upholding the Court of Appeals' decision, and rejecting all of CITMA's claims, including the First Amendment claim raised by this Petition. Pet. App. at 1-32. Finally, on May 16, 2006, the Minnesota Supreme Court denied CITMA's Petition for Rehearing in an Order that modified one paragraph in its March 16 Opinion. *See* Pet. App. at 72-76.

REASONS FOR DENYING THE PETITION

The Petition does not present a proper occasion for this Court to undertake consideration of CITMA's First Amendment claim. The Minnesota Supreme Court correctly understood and applied this Court's unconstitutional conditions doctrine because it recognized that the Act has none of the necessary elements of that claim: it is not aimed at the suppression of speech, it does not reference speech, and it does not offer manufacturers a benefit in a manner calculated to coerce the surrender of speech.

Second, the decision of the Minnesota Supreme Court does not conflict with the decision of any other state court or federal appellate court. Indeed, every court that has considered First Amendment challenges to statutes that impose costs similar in purpose and intent to the Minnesota Fee Act has rejected those challenges. Further, the allegedly conflicting cases CITMA cites are fundamentally different from this case.

Third, the notion that the Minnesota Supreme Court's opinion in this case will impact potential future

settlements in unrelated cases is not the type of compelling reason that justifies this Court's exercise of discretionary jurisdiction. This Court, like all courts, does not issue advisory opinions. Speculation about *potential* future events does not substitute for actual, justiciable controversies.

I. The Minnesota Supreme Court Properly Upheld The Constitutionality Of The Cigarette Fee Act Because That Act Has No Speech Suppression Purpose And No Economic Coercion.

The Minnesota Supreme Court correctly concluded that the Act does not abridge CITMA's free speech rights under the First Amendment to the United States Constitution.[4] More specifically, the court correctly ruled that the Act does not involve an unconstitutional condition that coerces the surrender of free speech rights. Because the Act pursues legitimate public health goals, is not directed at speech, and does not coerce the surrender of free speech rights, there is no basis for a Writ of Certiorari here.

CITMA properly notes that the government may not condition a tax exemption on the renunciation of free speech rights. *See Speiser v. Randall*, 357 U.S. 513, 529 (1958). However, the unconstitutional conditions doctrine is applied only where a law has as its purpose the suppression of speech, is expressly directed at speech, and the

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[4] The First Amendment provides in part that "Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people . . . to petition the government for a redress of grievances." U.S. CONST. amend. I. These prohibitions have been incorporated against the states through the Due Process Clause of the Fourteenth Amendment. *See, e.g., Stromberg v. California*, 283 U.S. 359 (1931).

suppression is achieved through economic coercion. *See id.* at 527-29; *Fed. Communications Comm'n v. League of Women Voters of California*, 468 U.S. 364, 381-84 (1984). None of those conditions are present here.

CITMA's Petition fails at the outset because it does not challenge the legitimacy or validity of the express purposes for the Act. CITMA urges the Court to ignore the purpose of Minnesota's Act, arguing that the *Speiser* rule applies "no matter what the purpose or intent of the government is in enacting a tax law or providing a subsidy." Pet. Br. at 16. This is wrong. Even the *Speiser* Court began with the purpose of the challenged California legislation, by contrasting it with permissible legislative purposes: "In these cases, however, there was no attempt directly to control speech but rather to protect, from an evil shown to be grave, *some interest clearly within the sphere of governmental concern*." *Speiser,* 357 U.S. at 527 (citing cases, emphasis added).

The Act's purposes, to discourage youth smoking and to equalize cigarette prices by ensuring that all manufacturers bear some measure of the health costs related to smoking, are clearly within the "sphere of governmental concern." CITMA did not challenge these purposes below, or the State's authority to impose fees to fund these purposes. CITMA's only argument is that these purposes should be ignored. But the cases that CITMA cites to support this argument, even though brought under the First Amendment, are fundamentally different from the claim that CITMA pressed below. *See Simon & Schuster, Inc. v. Members of New York State Crime Victims Board*, 502 U.S. 105 (1991); *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 222 (1987). These cases involved facially discriminatory, content-based speech restrictions.

See Simon & Schuster, Inc., 502 U.S. at 116 (noting that challenged law "singles out" only expressive activity and is "directed only at works with a specific content"); *Arkansas Writers' Project, Inc.*, 481 U.S. at 229 (noting that Arkansas tax "is not evenly applied to all magazines" and tax status depends entirely on content). This form of discrimination is, the Court noted, "particularly repugnant to First Amendment principles." *Arkansas Writers' Project, Inc.*, 481 U.S. at 229. And, it was because "selective taxation of the press . . . poses a particular danger of abuse by the State," *id.* at 228, that the Court declined to consider any censorial motive in those cases. *Id.* (*cited in Simon & Schuster*, 502 U.S. at 509).

The distinction between the unconstitutional conditions doctrine, and the facially discriminatory, content-based restrictions on the press that were at issue in *Simon & Schuster* and *Arkansas Writers' Project*, is a critical one that CITMA ignores. But it cannot be so easily dismissed because this Court has held that the government's "power to encourage actions deemed to be in the public interest is necessarily far broader where suppression of dangerous ideas is not the purpose." *Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 550 (1983) (applying unconstitutional conditions doctrine). The heightened scrutiny afforded to the discriminatory, content-based restrictions at issue in *Simon & Schuster* and *Arkansas Writers' Project, Inc.* is simply not applicable here because the Act is not facially discriminatory, there are no restrictions on the press, and absolutely nothing in the Act explicitly references speech, let alone content-based restrictions.

Even if the Court did not consider the legitimate purposes supporting the Act, CITMA's unconstitutional

conditions challenge fails for a second, separate reason: there is neither a speech restriction to the Act, nor an economic coercion element. The Minnesota Supreme Court correctly concluded that this void justified dismissal of CITMA's claim. *See* Pet. App. at 11; *cf. also Regan*, 461 U.S. at 545 (noting that appellant was "certainly incorrect when it claims that this case fits the *Speiser-Perry* model," and that challenged legislation did not deny a benefit based on exercise of First Amendment rights).

CITMA's claim does not fit the *Speiser-Perry* model. *Speiser* involved a California statute that annually required veterans seeking a property tax exemption to sign a loyalty oath declaring that they had not engaged in subversive speech. 357 U.S. at 515. The statute was "frankly aimed at the suppression of dangerous ideas." *Id.* at 519. If the veteran did not sign the oath, the property tax exemption was denied. *Id.* Through this effect, the State essentially purchased, or coerced, the surrender of speech rights: "[T]he denial of a tax exemption for engaging in certain speech necessarily will have the effect of coercing the claimants to refrain from the proscribed speech." *Id.*

The same two conditions rendered unconstitutional the statute at issue in *Fed. Communications Comm'n v. League of Women Voters of California*, 468 U.S. 364 (1984). Here, the challenged statute provided that, "[n]o noncommercial educational broadcasting station which receives a grant from the Corporation for Public Broadcasting . . . may engage in editorializing." *Id.* at 366, 371 n.7. This measure, the Court found, was "specifically directed at a form of speech – namely, the expression of editorial opinion – that lies at the heart of First Amendment protection." *Id.* at 381. The economic coercion element rested in

the availability of government grants only where broadcasters refrained from "editorializing." *Id.* at 370-71.[5]

The Act has neither of these elements, and the Minnesota Supreme Court therefore properly upheld its constitutionality. First, the Act does not even reference speech. Rather, it makes a product-based distinction, not a speaker or content distinction, that identifies those cigarettes sold in Minnesota that do not reflect health care cost internalization, versus those that do. *See* Pet. App. at 4-5, 41. The statutory distinction has nothing to do with which manufacturer has waived or not waived its First Amendment rights, as CITMA contends. Pet. Br. at 14.

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[5] Neither of the two decisions that CITMA cites in support of its claim, *Rosenberger v. Rectors & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995), and *Thompson v. Western States Med. Ctr.*, 535 U.S. 357 (2002), actually involved the application of this doctrine. Rather, *Rosenberger* involved viewpoint or content-based speech restrictions in the limited forum setting, as articulated in *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993). *See* 515 U.S. at 829-30 (reviewing principles that govern State's use of speech restrictions in a limited forum of the State's own creation). *Thompson* involved the proper application of this Court's decision in *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n of New York*, 447 U.S. 557 (1980) to admittedly lawful and truthful commercial speech. *See* 535 U.S. at 367 (noting relevance of proper application of *Central Hudson* and that government concedes speech at issue is neither misleading nor concerning unlawful activity). Even if these decisions are relevant to an unconstitutional conditions claim, both rested, at least in part, on a regulation directed at speech with economic coercion used to achieve the government's aim of restricting that speech. *See Rosenberger*, 515 U.S. at 834-36 (noting that regulation had a "speech-based restriction as its sole rationale and operative principle" and that denial of payments based on that regulation effects a "sweeping restriction" on speech); *Thompson*, 535 U.S. at 371, 376 (noting that government used FDA approval authority over compounded drugs to regulate speech, thus controlling large-scale marketing of those drugs, but unnecessarily excluding "beneficial speech").

Second, the Act does not offer manufacturers a government benefit in a manner calculated to coerce the surrender of free speech rights. Under the Act, a nonsettling manufacturer has two options: (1) it can refrain from seeking an agreement, allow the State to collect the 35-cent per-pack fee from cigarette distributors, and fully exercise its First Amendment rights; or (2) it can enter an agreement, make higher per-pack payments to the State, and voluntarily curtail certain advertising and lobbying activities.

The mere statement of these alternatives shows that the Act does not financially coerce manufacturers *to enter* agreements involving speech waivers. CITMA argues that the Act is unconstitutional because it can avoid the fee only by surrendering speech rights. Pet. Br. at 14. CITMA ignores, and prefers this Court to ignore, the fact that the decision to enter into an agreement with the State and waive certain speech rights imposes a more onerous financial requirement. The financial incentive, in other words, tends to *discourage* rather than to coerce new agreements. CITMA cites no decision in which a surrender of First Amendment rights was struck down as an unconstitutional condition where those rights were voluntarily waived by choosing the more expensive option. Nor does CITMA explain how the higher per-pack fee is a "benefit," when it costs less to retain its advertising and lobbying rights. Had Minnesota really intended to coerce the waiver of free speech rights, as CITMA alleges, it surely would not have made entering agreements the *costlier* option.

More importantly, CITMA's refusal to acknowledge these critical aspects of the Act demonstrates that CITMA's Petition should be denied.

II. The Minnesota Supreme Court Properly Considered The Economic Effect Of The Act And Then, Consistent With This Court's First Amendment Precedents, Upheld The Constitutionality Of That Act.

CITMA urges the Court to ignore a critical financial fact: that it costs more to enter into an agreement than to pay the fee. Citing *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983), CITMA asserts that this fact should have been deemed irrelevant to the Minnesota Supreme Court's consideration of CITMA's unconstitutional conditions challenge. *See* Pet. Br. at 19. This is incorrect. CITMA's attacks on the Minnesota Supreme Court's consideration of the economic realities of cigarette pricing do not undermine that court's careful and accurate analysis of the First Amendment issue.

CITMA's argument fails first because a court cannot consider an unconstitutional conditions challenge without considering the options posed. Indeed, application of that doctrine *requires* the careful weighing of two alternatives. *See* 4 R. Rotunda & J. Nowak, *Treatise on Constitutional Law* § 20.11, at 285 (3d ed. 1999) ("Courts must in each instance examine the substance of the condition to determine whether it violates constitutional principles."). If the Court cannot consider the financial consequences of both waiving and retaining a right, then it cannot ascertain whether the State is attempting to coerce a waiver by making waiver the more financially desirable alternative (as in *Speiser*). CITMA cannot invoke a weighing doctrine, but then ask the Court to ignore facts essential to proper weighing.

Second, *Minneapolis Star & Tribune* is entirely distinguishable. The challenged statute in that case

imposed a use tax on ink and paper used to produce publications, and thus plainly implicated speech. *Star & Tribune*, 460 U.S. at 577-78 & n.2. The State argued, *inter alia*, that the challenged measure actually *favored* publishers because a use tax on raw materials is less onerous than a sales tax on (higher-priced) final products. *Id.* The Court, however, declined the State's invitation to engage in an analysis of "the relative burdens of various *methods of taxation*." *Id.* at 589-90 & nn.12-14 (emphasis added).

CITMA's unconstitutional condition claim does not require this Court to evaluate "the relative burdens of various methods of taxation." *Star & Tribune*, 460 U.S. at 589.[6] Instead, it raises the very different question of whether the Act coerces manufacturers to enter settlement agreements. Consideration of the higher per-pack payments required by such agreements is essential to resolution of this issue, and demonstrates that the Act does not involve an unconstitutional condition. So long as manufacturers are truly free to decide – to choose between the Act's *offer* of settlement on terms acceptable to the State, or no settlement – there is no constitutional violation. The Act presents manufacturers with an entirely voluntary

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[6] The *Minneapolis Star & Tribune* case is also distinguishable because it obviously involves restrictions on the press, a fact the Court repeated throughout the portions that CITMA quotes. Thus, the Court was reluctant to consider the relative economic burdens because "the very selection of *the press* for special treatment threatens *the press* not only with the current differential treatment, but with the possibility of subsequent differentially more burdensome treatment." 460 U.S. at 588 (emphasis added). Similarly, the Court noted that it was "an extra burden on *the press*" that could allow censorial effects. *Id.* (emphasis added). CITMA's alterations to the quoted language, to substitute "taxpayer" or "entities" improperly minimizes the Court's focus on the press in this case.

business decision that turns upon each manufacturer's evaluation of the State's offer. If a manufacturer concludes that obtaining a release of legal claims is desirable or prudent, it can enter into an agreement undertaking a higher per-pack payment and waiving certain First Amendment rights. If a manufacturer does not wish to obtain a release, it can refuse to enter into an agreement, allow the State to collect the lower, 35-cent fee from distributors, and continue exercising all of its First Amendment rights.[7]

It was within this framework that the Minnesota Supreme Court concluded that the Act does not *coerce* settlement. Ignoring this framework, as CITMA urges, would require this Court to ignore the entire background and foundation for the Act. But this framework *is* relevant and confirms that the Act cannot be an unconstitutional condition where there is no coercive element.

Next, CITMA argues that "it is impossible to determine which of these choices has the greater inherent value or economic benefit for cigarette manufacturers." Pet. Br. at 21. But the question for the Court is not the "inherent value" of any choices, but simply whether a *burden* is imposed for exercising First Amendment rights. *See Speiser*, 357 U.S. at 529 (taxpayer could not be required to execute oath as a condition to obtaining benefit). Even

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[7] The voluntary nature of this choice has been upheld by federal courts that have considered the analogous Qualifying Statute under the MSA. *See Star Scientific, Inc. v. Beales*, 278 F.3d 339, 354 (4th Cir. 2002) (noting that manufacturer was free to join MSA "if it concluded that this would have been a better deal for it"); *S&M Brands, Inc. v. Summers*, 393 F. Supp. 2d 604, 638 (M.D. Tenn. 2005) (MSA Qualifying Statute "leaves Plaintiffs no worse off financially than they would be under the MSA").

if an inherent value is relevant to the court's analysis, it is only in the context of whether that value imposes a burden. In other words, the Minnesota Supreme Court properly concluded under *Speiser* that CITMA is no worse off should it decide to pay 35 cents per pack because it decides the inherent value of its advertising and lobbying rights is greater than the inherent value of waiving those rights and paying 48 cents per pack. In short, there is no burden.

Third, CITMA cannot avoid consideration of the financial differences between its choices by inaccurately characterizing the terms of the Act. CITMA misrepresents the Act when it argues that the Act "effectively condition[s] the right of Appellants to retain their First Amendment rights upon the payment of the Tax on their products." Pet. Br. at 22. But *all* cigarette manufacturers pay *a fee* that reflects the costs attributable to the use of cigarettes, whether that fee is paid under the terms of a settlement agreement, or under the terms of the Act. *See* Minn. Stat. § 297F.24, subds. 1, 2. The amount of the fee depends on whether a settlement agreement exists, in which case a *higher fee* is imposed and advertising and lobbying rights are waived. Pet. App. at 9 (noting stipulated facts on per-pack fee for settlement versus non-settlement cigarettes).[8]

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[8] For this reason, the decision in *Follett v. Town of McCormick*, 321 U.S. 573 (1944), is inapposite. The tax imposed there *increased* the taxpayer's cost of exercising his First Amendment freedom of religion. *Id.* at 574. Further, the Court noted that cases involving taxes on preachers' exercise of religious freedoms may require different standards than other First Amendment cases: "[S]ince they were engaged in a 'religious' rather than a 'commercial' venture, we held that the constitutionality of the ordinances might not be measured by the standards governing the sales of wares and merchandise by hucksters and other merchants." *Id.* at 575 (citation omitted). Finally, this Court has recognized that *Follett* is limited to a flat license tax that operates

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CITMA is therefore wrong when it argues that the Act "exempts all cigarettes made by manufacturers who have waived their First Amendment rights." Pet. Br. at 24.

CITMA can neither ignore nor wish away the express terms of the Act. The Minnesota Legislature's clear and unambiguous purpose in imposing the fee was to "ensure that manufacturers of nonsettlement cigarettes pay fees to the state that are comparable to costs attributable to the use of the cigarettes." Minn. Stat. § 297F.24, subd. 1(b)(1). And, the State sought to pursue its "policy of discouraging underage smoking [without nonsettlement manufacturers undermining that policy] by offering nonsettlement cigarettes at prices substantially below the cigarettes of other manufacturers." *Id.*, subd. 1(b)(2). Neither policy mentions advertising and lobbying rights.

Further, it is precisely because of these policies that the Minnesota Supreme Court properly considered the decisions of courts considering the Qualifying Statutes enacted following the MSA. *See* Pet. App. at 11-13. Regardless of the language differences between those statutes and the Minnesota Act, all of the States that settled legal claims and enacted statutes to address the marketplace response pursued similar goals: to avoid allowing underpriced cigarettes to undermine legitimate State concerns. Thus, CITMA's effort to characterize its competitive advantage as something other than unfair, Pet. Br. at 24-25, is unavailing. The Act is concerned with the significant price difference between settlement and nonsettlement

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as a prior restraint on the free exercise of religious beliefs. *See Jimmy Swaggert Ministries v. Board of Equalization of California*, 493 U.S. 378, 389 (1990).

cigarettes, and the likelihood that that price difference will undermine the State's policies regarding smoking. *See* Minn. Stat. § 297F.24.[9] The Minnesota Supreme Court therefore properly considered the price difference between settlement and nonsettlement cigarettes in concluding that the Act does not represent an unconstitutional burden on CITMA's advertising and lobbying rights. CITMA's attacks are unfounded, fail to accurately represent the terms and nature of the Act, and do not support granting the Writ.

III. This Court Does Not Exercise Its Discretionary Jurisdiction Based On Speculative Assumptions About Possible Future Settlements or Laws That Are Not Before The Court.

For its last plea, CITMA urges this Court to grant its Petition because other unnamed courts could use the Minnesota Supreme Court's opinion to enforce similar statutes in MSA member states and could use that opinion to enforce as-yet unenacted legislation that could follow the possible initiation and possible settlement, on possibly similar terms, of similar future lawsuits against other industries. Pet. Br. at 26-27. Both grounds advance only

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[9] For example, the price-elasticity of cigarettes – the extent to which a change in cigarette prices causes a change in demand – is far greater among young people than it is among adults. *See* Office of Smoking & Health, U.S. Department of Health & Human Services, *Reducing Tobacco Use: A Report of the Surgeon General* 19, 337, 359 (2000). And, the lower price of nonsettlement cigarettes (without the Act's fee) means that a significant percentage of smokers were able to once again shift to the State the health-related costs of their smoking. *Id.* at 352-55. A copy of this Report is available at http://www.cdc.gov/tobacco/sgr/sgr_2000/FullReport.pdf.

supposition and speculation as to future events. Neither is a basis for this Court's exercise of its discretionary jurisdiction. *See* Sup. Ct. Rule 10.

While there are multiple reasons why this last plea does not support certiorari, the most obvious is that the plea for guidance in hypothetical future cases invites this Court to issue a wholly advisory opinion. This Court's refusal to wade into the murky arena of "what if" is so well-established that it needs no further elaboration. *See United Public Workers of America (CIO) v. Mitchell*, 330 U.S. 75, 89 (1947) (federal courts do not render advisory opinions; for "adjudication of constitutional issues, concrete legal issues presented in actual cases, not abstractions, are requisite.") (citations omitted). Speculation and hypotheticals about cases that are *not even filed*, or even if filed, may not be settled on terms CITMA envisions, are not the basis for certiorari jurisdiction. CITMA's Petition cannot be granted on this ground, and should therefore be denied.

CONCLUSION

For all the foregoing reasons, the Petition of the Council of Independent Tobacco Manufacturers of America should be denied.

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Respectfully submitted,

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